ORIENTAL BANK BHD.

v.

ABDUL RAZAK ROUSE

HIGH COURT BORNEO, KOTA KINABALU
ABU MANSOR ALI J
[ORIGINATING SUMMONS NO. 100 OF 1984]
18 NOVEMBER 1985

LEGAL PROFESSION: *Solicitor's undertaking - Breach - Enforcement of - Personal and professional capacity - Enforcement by Court - Jurisdiction of Court - High standard of conduct - Terms of undertaking must be clear, unqualified and unequivocal - Plain breach of undertaking - Acting for two parties - Conflicting interests.*

The plaintiffs had granted a loan of RM5 million to one Datu Hj. Abdul Salam bin Datu Harun (hereinafter referred to as the "borrower"). The loan was to be secured by charges against Sabah and Kuala Lumpur lands. The defendant, who acted as a solicitor for the plaintiffs, was instructed by the plaintiffs to prepare and register the said charges. The charge against the Sabah lands was duly registered but not the Kuala Lumpur lands. On 30 April 1982, the defendant requested that the plaintiffs release a further sum of RM600,000 to redeem the charge on the Kuala Lumpur lands, held by Bank Bumiputra Malaysia Bhd. and to recharge the same in favour of the plaintiffs. The plaintiffs on 3 May 1982 duly credited the RM600,000 into the defendant's firm account. Although the said sum was paid to the defendant, the defendant failed to present the charge in respect of the Kuala Lumpur lands for registration. The plaintiffs sent five reminders to the defendant but the defendant has yet to present it for registration as promised.

The plaintiffs now pray for an order that the defendant do within 14 days from the date of this order cause to be lodged for registration with the Land Registry, Kuala Lumpur, under the National Land Code, a charge for the sum of RM5 million in favour of the plaintiffs against the Kuala Lumpur lands and that the defendant do within the said period, produce to the plaintiffs a certificate from the said Land Registry stating that the said charge has been lodged for registration pursuant to his written undertaking contained in his letter of 30 April 1982.

The issue before the Court was whether the defendant did in law give an undertaking in his professional capacity and if he did, was there breach of that undertaking?

Held:

[1] The position of the law on the subject of a solicitor's undertaking is clearly set out in *Halsbury's Laws of England* (4th Edition) Vol. 44 at para. 225 (reproduced in full in the judgment).

[2] The Court agreed with the submission of Counsel for the plaintiffs that the defendant's case is somewhat similar to the case of *T. Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267 PC where Lord Diplock held on similar facts, that the failure of the solicitor to pay the balance, on registration of transfer, was a plain breach of the undertaking.

[3] As regards the defendant's alleged defence that he used his own discretion to protect the interests of both his clients, the Court also agreed with the submission of plaintiffs' Counsel that in doing so he is not relieved from his undertaking. The position in which the defendant found himself in is well set out in *Ong Kian Khoon v. Gaya Filem Bhd.* [1979] 1

MLJ 79 @ 81 where Raja Azlan said that it was impossible for one person to give satisfactory service to two parties with conflicting interests and that a man who puts himself in such a position may find himself being false to one and possibly to both.

[4] The Court was satisfied on the balance of probabilities that the defendant breached the undertaking he gave to the plaintiffs in his professional capacity and it applied the case of *T. Damodaran v. Choe Kuan Him* (supra).

[Order in terms as prayed by plaintiffs. Costs to plaintiffs.]

Cases referred to:
T. Damodaran v. Choe Kuan Him [1979] 2 MLJ 267
Geoffrey Silver & Drake v. Baines [1971] 1 All ER 473
Ong Kian Khoon v. Gaya Filem Bhd. [1979] 1 MLJ 79
Moody v. Cox and Hatt [1917] 2 Ch 71

Legislation referred to:
Contracts Act 1950, s. 68

Other source referred to:
Halsbury's Laws of England, 4th Edn., Vol. 44, para. 255

For the plaintiffs - Joseph Lee Henn Shen; M/s. Joseph Lee & Co.
For the defendant - Mariati Robert; M/s. Rayner & Co.

[**Editor's Note:** Defendant filed Notice of Appeal to Supreme Court on 6.11.85.]

JUDGMENT

Abu Mansor Ali J:

The plaintiffs in their originating summons dated 23 November 1984, pray for an order that the defendant, Encik Abdul Razak Rouse, do within 14 days from the date of this order cause to be lodged for registration with the Land Registry, Kuala Lumpur, under the National Land Code a charge for the sum of five million ringgit (RM5 m) in favour of the plaintiffs against the lands held under titles nos:

(a) Hakmilik Sementara (Daftar) No. 31890 No. 287 P.T. No. 1966 s. 41, Town and District of Kuala Lumpur; and

(b) Hakmilik Sementara (Daftar) No. 31891 No. 285 P.T. No. 1967 s. 41, Town and District of Kuala Lumpur;

and do within the said period produce to the plaintiffs a certificate from the said Land Registry stating that the said charge has been lodged for registration pursuant to his written undertaking contained in a letter dated 30 April, 1982, written by the said Encik Abdul Razak Rouse to the plaintiffs and that the defendant do pay the costs of and occasioned by this application.

In support of their application their branch manager, Ismail Darus, filed an affidavit sworn on 26 October 1984, Enclosure (10), in which he deposed that the plaintiffs granted a loan of RM5 million to Datu Hj. Abdul Salam bin Datu Harun (the borrower) on or about 2 February 1982 (Exhibit 'ID-1'). The loan was to be secured by charges against Sabah and Kuala Lumpur lands. Defendant who acted as a solicitor for plaintiffs was instructed by the plaintiffs to prepare and register the said charges. The charge against the Sabah lands was duly registered but not the Kuala Lumpur lands.

In respect of the Kuala Lumpur lands, however, on 30 April 1982 the defendant wrote a letter to plaintiffs (Exhibit 'ID-2') as follows:

> Re: Fixed terms loan of RM5,000,000 to Datu Haji Abdul Salam bin Datu Harun
>
> We refer to the above matter and write to request for your kind approval to release a further sum of Malaysian Ringgit Six Hundred Thousand Only (RM600,000) to enable us to redeem the charge on Dashrun Hotel Sdn. Bhd. properties held by Bank Bumiputra Malaysia Bhd. and to recharge the same in favour of your bank and also to settle some of the other creditors as stated in our client's application.

The Kuala Lumpur lands on which Dashrun Hotel stands are:

(a) Hakmilik Sementara (Daftar) No. 31890 No. 287 P.T. No. 1966 s. 41, Town and District of Kuala Lumpur; and

(b) Hakmilik Sementara (Daftar) No. 31891 No. 285 P.T. No. 1967 s. 41, Town and District of Kuala Lumpur.

It is not disputed that on 3 May 1982 in response to the defendant's request the plaintiffs duly credited the RM600,000 requested into defendant's firm account. Though the said sum of RM600,000 was paid to the defendant, the defendant failed to present the charge in respect of the Kuala Lumpur lands for registration. The plaintiffs sent five reminders as Exhibits'ID-4' to 'ID-8' but the defendant has still to have it presented for registration as he promised in 'ID-2'.

The plaintiffs' Counsel submitted that before an undertaking can be enforceable against the defendant it must be clear and unequivocal but the word "undertake" need not even be used. As authority plaintiffs' Counsel cited the case of *T. Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267 where the facts are somewhat similar to the defendant's case in that it was a similar promise by the defendant's solicitor to pay over purchase money to vendor upon the registration of the transfer of certain piece of lands. The transfers were registered duly but no payment was made to the vendor.

The plaintiffs submitted that in this present case the defendant acted for the plaintiffs and he gave his professional undertaking as a solicitor (see *Geoffrey Silver & Drake v. Baines* [1971] 1 All ER 473) in a letter written on his firm's letterhead. His undertaking can only be discharged by the due registration of the charge against the Kuala Lumpur lands.

The plaintiffs' Counsel further submitted that a matter which is not disputed by the defendant after giving the undertaking when the borrower refused to have the Kuala Lumpur lands charged to the plaintiffs the defendant failed to inform the plaintiffs, his client, of that fact. The defendant instead took instructions from the borrower and began acting for the borrower in complete disregard of his undertaking and his duties towards plaintiffs. The plaintiffs also submitted in doing so he broke a cardinal rule of his profession by acting for two parties whose interests conflict in that he tried to serve two masters. In trying to do so he failed to discharge his undertaking.

In his defence the defendant filed an affidavit-in-reply and a further affidavit-in-reply sworn on 11 March 1985 and 18 March 1985 respectively. The defendant in his affidavit sworn on 18 March 1985 (second affidavit) stated in defence, in paragraph 3 thereof, that his firm on 6 November 1982 received a letter ('ARR-6') from M/s. Nicholas Fung Wong & Co., the then plaintiffs' solicitors, informing his firm that the plaintiffs had withdrawn the credit facilities extended to borrower after a receiving and adjudicating order was made against him by the

High Court, Kuala Lumpur, on 12 July 1982 and at the same time enclosing a notice by chargee in case of default although his firm had on 21 October 1982 written a letter ('ARR-4') to plaintiffs enclosing Architect's Certificate No. A21764 and requesting for the release of the nett amount of RM232,500 shown in the said certificate. His firm also did receive a request by plaintiffs for refund of the sum of RM600,000 which request was subsequently withdrawn by the plaintiffs and the plaintiffs did request him to proceed with the registration of the Kuala Lumpur lands ('ARR-10' dated 14 January 1983 - Enclosure (17)).

In paragraph 5 of his second affidavit he said that it was after the facilities were withdrawn and notice of the foreclosure was served on the borrower that defendant received strict instructions from the borrower not to proceed with the registration of Kuala Lumpur lands. He used his discretion then and he channeled the funds he obtained to meet contractors' demand on the borrower. Since he was acting for both parties he said he had the duty to protect both parties' interests in this matter. The defendant further said since the plaintiffs had only released RM3,837,500 out of RM5 million loan with a security valued at RM6.3 million (in Sabah lands) and whereas and on the other hand the borrower had to meet contractors' claims he felt it was fair not to charge the Kuala Lumpur lands so that the borrower could use it to raise further funds from another bank.

The Counsel for defendant alleged that as the plaintiffs had by their own action stopped the credit facilities s. 68 of the Contracts Act applied which provides that if any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise the promisor is excused by the neglect or refusal to any non-performance caused thereby. In short what Counsel was trying to say was just because the balance of the loan was temporarily withheld by plaintiffs from 6 November 1982 (Paragraph 3, Enclosure (17)) to 14 January 1983 ('ARR-10", Enclosure (17)), this was sufficient to relieve the defendant from having to perform his undertaking. She did not say, however, that the plaintiffs had waived the undertaking.

The issue before the Court was whether the defendant in law did give an undertaking in his professional capacity and if he did was there breach of that undertaking?

The position of the law on the subject is clearly set out in *Halsbury's Laws of England* (4th Edn.) vol. 44 at para. 255 thus:

> Enforcement of undertakings. Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person, or gives an undertaking to the Court in the course of proceedings, that undertaking may be enforced summarily upon application to the court. Before this remedy can be pursued it must be shown that the undertaking is given by the solicitor personally, and not merely as agent on behalf of his client. The undertaking must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.
>
> The jurisdiction is based upon the court's right to require its officers to observe a high standard of conduct; it is immaterial that no misconduct on the part of the solicitor is suggested. The solicitor cannot, therefore, defend himself on the ground that his undertaking is not enforceable as a contract against him, or on the ground that the application has been delayed. Nor will an undertaking given under a mistaken belief of having authority to fulfil it be set aside; nor can the solicitor withdraw from his undertaking save by consent; but an undertaking given by mistake in too wide terms will not be enforced insofar as it was mistakenly given.
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> The undertaking must be clear in its terms. The whole of the agreement to which it relates must be before the court, and the undertaking must be one which is not impossible *ab initio* for the solicitor to perform. Nevertheless, an undertaking will be enforced against the solicitor

> even though, after it is given, the client dies or instructs the solicitor not to perform it, or changes his solicitor. If performance of the undertaking has been waived the undertaking will not be enforced afterwards. Similarly, if the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced.

The Court agreed with the submission of Counsel for the plaintiffs that defendant's case is somewhat similar to the case of *T. Damodaran v. Choe Kuan Him* (supra) where the solicitor said he would pay over the purchase money to the vendor on a certain happening which took place. In defendant's case he gave an undertaking to have the Kuala Lumpur lands charged on the plaintiffs paying the RM600,000 asked for and the plaintiffs performed their part of the bargain. In *T. Damondaran v. Choe Kuan Him* [1979] 2 MLJ 267 at 268 Lord Diplock said:

> The terms of the solicitor's undertaking are clear, unqualified and unequivocal. The event on the happening of which the money was to be paid took place on 16 April 1974, when the transfer of the lands was 'duly registered in the name of the purchaser Messrs. Syarikat Alor Merah Sdn. Bhd'. The failure to pay the balance of RM182,200 is, on the face of it, a plain breach of the undertaking. There would seem to be no reason why in the instant proceedings, commenced on 30 July 1974, by Originating Summons against the solicitor to enforce the undertaking, the vendor should not recover judgment for the balance of RM182,200 with interest from 16 April 1974.

As regards the defendant's alleged defence that he used his own discretion to protect the interests of both his clients, the Court also agreed with the submission of the plaintiffs' Counsel that in doing so he is not relieved from his undertaking. True to say in his doing so he went into deeper waters and breached his undertaking to the plaintiffs which resulted in the Kuala Lumpur lands not being charged to plaintiffs, the net result of which was that he was even instrumental to the borrower breaching his loan agreement ('ID-1'), Enclosure (11), containing definite schedule of payments -drawdowns - and it was not disputed that RM3.8 million had already been paid out to borrower without the security documentation having been completed. As to the temporary stoppage, if it can be termed such, it was of no consequence as the defendant was never relieved of his undertaking and according to the schedule of payments in 'ID-1' the last payment of RM1.4 million would only be released by the plaintiffs on production of an architect's certificate which was only being sent on 21 October 1982 ('ARR-4') and the temporary stoppage and also the notice was in fact withdrawn ('ARR-10') and the defendant was requested to honour the undertaking given.

The position in which the defendant found himself in is well set out in *Ong Kian Khoon v. Gaya Filem Bhd.* [1979] 1 MLJ 79 where Raja Azlan said at page 81:

> It is impossible for the same person to give satisfactory service as the confidential and expert adviser of two parties with conflicting interests. The man who undertakes to serve two masters may easily find himself in a position where he must be false to one and possibly to both.

Indeed it was when the defendant tried to act for both masters that found himself in this predicament, a fault brought by him upon himself as Scrutton LJ said so and did so warn in *Moody v. Cox and Hatt* [1917] 2 Ch 71:

> It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests ... The Court was satisfied on the balance of probabilities that the defendant breached the undertaking he gave to the plaintiffs in his professional

capacity and it applied the case of *T. Damodaran v. Choe Kuan Him* (supra) in which the Court is bound to follow and it then gave an order in terms as prayed by plaintiffs in their originating summons dated 23 November 1984 and costs.

The defendant appeals.

Also found at [1986] 1 CLJ 619